

1 Edward P. Moriarity
2 MORIARITY BADARUDDIN & BOOKE
3 736 South Third Street West
4 Missoula, Montana 59801
5 406-728-6868
6 406-728-7722 Fax
7 *Attorneys for Plaintiff*

8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF MONTANA**
10 **BUTTE DIVISION**

11 BRIAN KOPEIKIN, M.D.,

12 Plaintiff,

13 vs.

14 MOONLIGHT BASIN
15 MANAGEMENT, LLC, D/B/A
16 MOONLIGHT BASIN RESORT,
17

18 Defendants.
19

Case No.: *CV-12-48-BU-DCL*

20 **COMPLAINT AND JURY**
21 **DEMAND**

22 BRIAN KOPEIKIN, M.D., through counsel, for his causes of action, alleges
23 as follows:

24 **PARTIES, JURISDICTION AND VENUE**

25 1. Plaintiff Brian Kopeikin, M.D., is a board-certified anesthesiologist
26 who resides in Santa Barbara, California and is a citizen of the state of California.

27 2. On information and belief, Plaintiff alleges that Defendant Moonlight
28 Basin Management, LLC (hereinafter "Moonlight Basin"), is a Montana limited
liability company whose principal office address is 56 Edwards Village Boulevard

1 # 201, Edwards, Colorado 81632-0000, and that Defendant Moonlight Basin was
2 doing business as Moonlight Basin (ski) Resort in Madison County, Montana at all
3 times relevant hereto.

4 3. Defendant Moonlight Basin's principal place of business is Montana
5 and the center of its business activities is Montana, therefore, Defendant Moonlight
6 Basin is a citizen of Montana for jurisdictional purposes.

7 4. This court has jurisdiction of the claims made in this matter under 28
8 U.S.C. § 1332(a)(1) because there is complete diversity of citizenship between Dr.
9 Kopeikin and Defendant Moonlight Basin and the amount in controversy greatly
10 exceeds \$75,000.

11 5. Venue is proper in the Butte Division of the United States District
12 Court for the District of Montana under 28 U.S.C. § 1391(b)(1) and (2), because
13 Defendant Moonlight Basin resides in Montana and because the acts and omissions
14 giving rise to the claim made herein occurred in Madison County, Montana and
15 within the Butte Division of the United States District Court for the District of
16 Montana.

17 **FACTS COMMON TO ALL CAUSES OF ACTION**

18 6. On February 5, 2012, Dr. Kopeikin, then age 49, was an invited guest
19 of Defendant Moonlight Basin and was skiing with a friend, Dr. Sven Rose, on
20 premises owned, managed, altered, maintained, created and/or controlled by
21 Defendant Moonlight Basin.

22 7. The conditions on February 5, 2012, were desirable for skiing; the
23 snow was powder, visibility was clear, the wind was calm, and the temperature
24 was between zero and thirty-two degrees Fahrenheit.

25 8. Dr. Kopeikin is a very experienced skier.

26 9. After lunch, Dr. Kopeikin and Dr. Rose boarded the Six Shooter
27 chairlift at the Madison Village Base Area.

28 10. Upon exiting the Six Shooter chair, Dr. Kopeikin and Dr. Rose

1 considered riding the Headwaters chair to access expert terrain in the Stillwater
2 Bowl area of Moonlight Basin.

3 11. However, Dr. Kopeikin and Dr. Rose thought that the terrain in the
4 Stillwater Bowl area looked challenging and rocky so they decided to "take it
5 easy" and, instead, opted to take an intermediate run called "Fast Lane," which
6 accessed "Upper Elkhorn," a slightly more difficult run.

7 12. At approximately 1:11 p.m., Dr. Kopeikin and Dr. Rose were skiing
8 down "Upper Elkhorn," with Dr. Rose slightly downhill and to skier's left of Dr.
9 Kopeikin. Both skiers were traveling well under control and at medium speed.

10 13. "Upper Elkhorn" crosses an unnamed cat track that was not a
11 naturally occurring or natural condition on the mountain; that was cut into the
12 mountain by Defendant Moonlight Basin; that altered the natural surface and
13 subsurface condition of the mountain; that was maintained in its artificial condition
14 by Defendant Moonlight Basin; and that was not otherwise a natural surface or
15 subsurface condition.

16 14. At the point where the cat track crossed the "Upper Elkhorn" run, the
17 cat track was cut and maintained by Defendant Moonlight basin in such a
18 configuration that the downhill edge of the cat track was higher than the uphill
19 edge of the cat track, causing the cat track to slope downward in the uphill
20 direction. This also was not a natural surface or subsurface condition, as depicted
21 by the photograph attached hereto as Exhibit 1 and incorporated herein by this
22 reference.

23 15. Both edges or boundaries of the cat track were lined with boulders
24 that were imported to those locations, and were not natural surface or subsurface
25 conditions. Rather, the boulders appear to have been placed alongside the cat track
26 to delineate the path of the cat track.

27 16. Beginning at the downhill edge of the cat track, and continuing for a
28 distance of approximately 50 feet downhill of the cat track, is a boulder field

1 comprised of large, craggy and sharp rocks.

2 17. The boulder field appears to have been created by the construction
3 and/or grading of the cat track.

4 18. In addition, it appears that boulders placed on the downhill edge of the
5 cat track migrated downhill and came to a rest in the boulder field, and within the
6 "Upper Elkhorn" run.

7 19. The position and slope of the man-made cat track prevented skiers
8 uphill of the cat track from having a sightline to the terrain immediately downhill
9 of the cat track, thereby preventing skiers from seeing hazards present immediately
10 downhill of the cat track.

11 20. There were no warning signs, poles, fences or devices of any kind at
12 or above the cat track that gave notice of the cat track, nor advice or information to
13 skiers on "Upper Elkhorn" that a boulder field lay immediately below the cat track,
14 or that any hazardous condition or danger of any type existed immediately below
15 the cat track.

16 21. As Dr. Kopeikin crossed the cat track, he saw, for the first time, and
17 with no time or opportunity to take evasive action, the boulder field in the "Upper
18 Elkhorn" run immediately below the cat track.

19 22. To avoid head injury, Dr. Kopeikin tucked his shoulder, rolled, and
20 landed on his back in the rocks, sustaining multiple, severe, life-threatening,
21 disabling and permanent injuries that are described in greater detail below.

22 23. Defendant Moonlight Basin ski patrol arrived at the scene and
23 transported Dr. Kopeikin by ski gurney downhill, where he was taken by
24 ambulance to Bozeman Deaconess Hospital.

25 24. Dr. Kopeikin was admitted to the intensive care unit at Bozeman
26 Deaconess Hospital, and was an in-patient for eleven days. Doctors at Deaconess
27 Hospital diagnosed the following injuries:

28 a. Eleven fractured ribs, left side, ribs three through twelve;

- 1 b. Flail chest;
- 2 c. Left shoulder acromial fracture;
- 3 d. Left shoulder coracoid base fracture with intra-articular
- 4 extension;
- 5 e. Left shoulder loose bodies with labral tearing and glenohumeral
- 6 arthritis;
- 7 f. Hemothorax;
- 8 g. Laceration of the spleen;
- 9 h. Multiple lacerations, contusions and abrasions.

10 25. Dr. Kopeikin experienced severe pain and substantial difficulty with
11 his injuries during his hospital course. Among other complications, Dr. Kopeikin
12 suffered from renal insufficiency while hospitalized and became septic, which
13 required placement of a long term IV access device through a vein in his arm and
14 into his heart, followed by six weeks of IV antibiotic therapy.

15 26. By the eleventh post-trauma day, Dr. Kopeikin's condition had
16 stabilized sufficiently that he was discharged to be taken home to California for
17 further care.

18 27. In the months following Dr. Kopeikin's release from the hospital, he
19 required continuous care to manage his injuries. On or about February 22, 2012,
20 Dr. Kopeikin required Thoracentesis to remove 700cc of blood from his chest,
21 which rapidly re-accumulated due to ongoing internal bleeding. On or about April
22 24th, 2012, he began an extremely painful course of physical therapy in an attempt
23 to mobilize, and to restore the use of, his injured chest, shoulder and arm.
24 However, Dr. Kopeikin suffered complete non-union of his multiple scapular
25 fractures and was forced to undergo surgery.

26 28. On October 4, 2012, Dr. Kopeikin underwent the following surgical
27 procedures to repair his scapula and shoulder.

- 28 a. Left shoulder open reduction internal fixation of acromion base

1 fracture;

2 b. Left shoulder open reduction internal fixation of coracoid base
3 fracture;

4 c. Left shoulder arthroscopic glenohumeral debridement of damaged
5 cartilage and removal of loose bodies.

6 d. Excision of distal clavicle.

7 29. Despite the physical, medical, and surgical treatments and therapies,
8 Dr. Kopeikin has not recovered and will not recover from his injuries; and Dr.
9 Kopeikin will require further surgery, including one or more total shoulder
10 replacements during his lifetime.

11 30. Dr. Kopeikin continues to experience significant physical pain as a
12 direct and proximate result of the injuries he sustained at Defendant Moonlight
13 Basin.

14 31. As the direct and proximate result of his injuries, Dr. Kopeikin has
15 been unable to work as an anesthesiologist, which has caused and continues to
16 cause additional and substantial psychological pain and suffering, and great
17 personal and professional anxiety, in addition to the pain, suffering and anxiety
18 caused by his physical injuries.

19 32. As the direct and proximate result of his inability to work as an
20 anesthesiologist, Dr. Kopeikin has suffered a loss of professional income of at least
21 \$600,000 to date; he will suffer a lifetime loss of professional income of at least
22 \$8,000,000; he will suffer a loss of earning capacity; he has incurred medical
23 expenses in the approximate amount of \$90,000.00 to date; and he will incur future
24 medical expenses in an amount that is still to be determined.

25 **FIRST CLAIM FOR RELIEF:**

26 **GROSS NEGLIGENCE AND NEGLIGENCE: PREMISES LIABILITY**

27 33. Dr. Kopeikin incorporates by reference the preceding paragraphs the
28 same as though fully set forth herein.

1 34. At all times relevant hereto, Defendant Moonlight Basin and its agents
2 and employees owed a duty to all persons invited to and paying for the use of
3 Defendant's premises, including Dr. Kopeikin, to exercise reasonable care to
4 construct, maintain and operate the premises in a reasonably safe condition and
5 reasonably safe manner, free from hidden, undiscoverable, unidentified, unmarked,
6 unbarricaded and unwarned of hazards, such as the unreasonable and unexpected
7 hazard created by the cat track and the visually-obstructed boulders described
8 above.

9 35. The hazards created by the cat track and obstructed boulder field were
10 man-made and were not a natural surface or sub-surface condition.

11 36. Defendant's acts and omissions in breach of its duties include, without
12 limitation, the initial design, construction and creation of the unreasonable hazard;
13 the method of cutting and maintaining the cat track; the ongoing maintenance of
14 the cat track and adjacent area in a hazardous configuration and condition; the
15 failure to inspect the premises for unreasonable hazard; the failure to mark and
16 mitigate the unreasonable hazard; and the failure to place barriers, or to provide
17 notice or warning of the unreasonable hazard.

18 37. By virtue of their continuous physical presence on the Upper Elkhorn
19 run, Defendant had actual and constructive notice and knowledge of the nature and
20 severity of the hazard prior to the time of Dr. Kopeikin's injuries and damages.

21 38. The hazard was of such a nature and severity, and existed for such a
22 period of time, that the Defendant, in the exercise of ordinary care as a ski resort
23 operator, should have recognized and mitigated the hazard before it caused injury
24 to Dr. Kopeikin.

25 39. Defendant's acts and omissions proximately caused the injuries and
26 damages that Dr. Kopeikin has suffered, and that he will continue to suffer, for the
27 remainder of his life.

28

1 40. As the direct and proximate result of these breaches of duty by
2 Defendant Moonlight Basin, Dr. Kopeikin has sustained serious and permanent
3 physical and psychological injuries, and has sustained, and will sustain, special and
4 general damages in amounts that far exceed the jurisdictional limits of this Court,
5 as more particularly described below in the section of this complaint entitled
6 "Damages."

7 **SECOND CLAIM FOR RELIEF:**

8 **NEGLIGENT HIRING, TRAINING, SUPERVISION AND MANAGEMENT**

9 41. Plaintiff incorporates by reference the preceding paragraphs the same
10 as though fully set forth herein.

11 42. Defendant Moonlight Basin owed a duty to all persons invited to and
12 paying for the use of Defendant's premises, including Dr. Kopeikin, to act
13 reasonably in hiring, training, directing, instructing, supervising and managing its
14 agents, representatives and employees, to ensure that such agents knew how to
15 design, construct, create, maintain and operate a reasonably safe premises to
16 provide a reasonably safe skiing experience for patrons using Defendant's ski area.

17 43. By its acts and omissions described above, Defendant Moonlight
18 Basin breached these duties in that it failed to hire, train, direct, instruct, supervise
19 and manage its agents so as to avoid designing, constructing, maintaining the
20 hazard that caused injury to Dr. Kopeikin.

21 44. By its acts and omissions described above, Defendant Moonlight
22 Basin breached these duties in that it failed to ensure that its agents had adequate
23 skills, and used their skills, to recognize and mitigate and/or warn of, or place
24 barriers at, hazards such as that which injured Dr. Kopeikin.

25 45. As the direct and proximate result of these breaches of duty, Dr.
26 Kopeikin has sustained serious and permanent physical and psychological injuries,
27 and he has sustained and will sustain special and general damages in amounts that
28

1 far exceed the jurisdictional limits of this Court, as more particularly described
2 below in the section of this complaint entitled "Damages."

3 **DAMAGES**

4 44. Plaintiff incorporates by reference the preceding paragraphs the same
5 as though fully set forth herein.

6 45. As a direct and proximate result of the acts and omissions of
7 Defendant Moonlight Basin, Dr. Kopeikin has suffered severe and permanent
8 personal injuries, resulting in special and general damages including, but not
9 limited to, the following:

- 10 a. Past medical expenses in the approximate amount of \$90,000.00.
- 11 b. Future medical expenses in an amount to be determined and to be
12 proved at the trial of this case;
- 13 c. Lost income in the approximate amount of \$600,000;
- 14 d. Future lost income in the amount of at least \$8,000,000;
- 15 e. Past loss of earning capacity in an amount to be proved at trial;
- 16 f. Future loss of earning capacity in an amount to be proved at trial;
- 17 g. Past physical pain and suffering in an amount to be proved at trial;
- 18 h. Future physical pain and suffering in an amount to be proved at trial;
- 19 i. Past emotional pain and suffering in an amount to be proved at trial;
- 20 j. Future emotional pain and suffering in an amount to be proved at trial;
- 21 k. Past physical and functional disability in an amount to be proved at
22 trial;
- 23 l. Future physical and functional disability in an amount to be proved at
24 trial;
- 25 m. Past physical disfigurement in an amount to be proved at trial;
- 26 n. Future physical disfigurement in an amount to be proved at trial;
- 27 o. Past and future loss of enjoyment of life in an amount to be proved at
28 trial;

- 1 p. Other past special damages in an amount to be proved at trial;
- 2 q. Other future special damages in an amount to be proved at trial;
- 3 r. Other past general damages in an amount to be proved at trial;
- 4 s. Other future general damages in an amount to be proved at trial.

5 46. Prior to the injuries and damages suffered by Dr. Kopeikin, Defendant
6 and its agents, representatives and employees had actual knowledge and notice of
7 the hazard that caused Dr. Kopeikin's injuries and damages, by virtue of at least
8 the following facts: (a) the design, construction, creation, maintenance and
9 operation of the cat track, (b) the obstructed line of sight from above the cat track
10 to the area immediately below the cat track caused by the location and slope of cat
11 track, (c) the presence of the boulder field immediately below the cat track, and (d)
12 the absence of barriers or warnings at or above the cat track, such that Defendants
13 created a high probability of injury to Dr. Kopeikin and others similarly situated;
14 yet, Defendants deliberately operated and continued to operate the "Upper
15 Elkhorn" run, in that hazardous condition, in conscious and/or intentional disregard
16 of the high probability of injury to Dr. Kopeikin and others similarly situated.

17 47. Alternatively, Defendants, and each of them intentionally disregarded
18 the facts concerning the hazard created by (a) the design, construction, creation,
19 maintenance and operation of the cat track, (b) the obstructed line of sight from
20 above the cat track to the area immediately below the cat track caused by the
21 location and slope of cat track, (c) the presence of the boulder field immediately
22 below the cat track, and (d) the absence of barriers or warnings at or above the cat
23 track, such that Defendants created a high probability of injury to Dr. Kopeikin and
24 others similarly situated, but deliberately operated and continued to operate the
25 "Upper Elkhorn" run, in that hazardous condition, in deliberate indifference to the
26 high probability of injury to Dr. Kopeikin and others similarly situated.

27 48. Based on their conscious and/or intentional disregard and/or deliberate
28 indifference to the high probability of injury to Dr. Kopeikin and others similarly

1 situated, an award of punitive and exemplary damages is proper to deter these
2 defendants, and others similarly situated, from future similar misconduct.

3 **WHEREFORE**, Plaintiff respectfully prays that the Court enter judgment
4 against Defendants, and each of them, as follows:

5 a. For such general damages, past and future, as Dr. Kopeikin shall
6 prove himself entitled at the trial of this case;

7 b. For such special damages, past and future, as Dr. Kopeikin shall prove
8 himself entitled at the trial of this case;

9 c. For an award of punitive and exemplary damages; and

10 d. For such other and further relief as the Court deems just and equitable
11 under the circumstances.

12
13 DATED this 12th day of June 2013.

14
15
16 /s/ Edward Moriarity
17 Edward P. Moriarity
18 MORIARITY BADARUDDIN &
19 BOOKE
20 736 South Third Street West
21 Missoula, Montana 59801
22 406-728-6868
23 406-728-7722 Fax
24 *Attorneys for Plaintiff*
25
26
27
28

DEMAND FOR JURY TRIAL

Plaintiff, through counsel, respectfully demands a jury trial of all issues herein and submits the requisite fee herewith.

DATED this 12th day of June 2013.

/s/ Edward Moriarity
Edward P. Moriarity
736 South Third Street West
Missoula, Montana 59801
406-728-6868
406-728-7722 Fax
Attorneys for Plaintiff

Google earth

Eye alt 9417 ft

Summer Road

© 2013 Google
Image 4m at Can Land Development

45° 17' 22.99" N 111° 25' 59.53" W elev. 8902 ft

imagery Date: 03/12/09 1995